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Supreme Court, U. S.
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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

GILBERT E. CALLOW, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

GILBERT E. CALLOW, JR.,
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QUESTIONS PRESENTED FOR REVIEW

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1. The Petitioner has been denied "equal protection and due process" of the law as required under *Amendment XIV of the United States Constitution* and the right "to have assistance of Counsel for his defense" as required by *Amendment VI of the United States Constitution*. The record substantiates that the Petitioner did not "voluntarily and intelligently elect" to proceed without Counsel. *Faretta v. California, 422 U.S. 806.* The Trial court Judge, prior to allowing the Petitioner to proceed pro-se, failed to establish the educational background of the Petitioner, failed to make any investigation of the Petitioner as to his capability to provide an adequate defense. The Trial court Judge throughout the proceedings advised the Petitioner that he was not "getting good legal advice", yet the Court failed to take any measures to secure adequate Legal Counsel for the Petitioner.

The Petitioner did make an attempt to secure Legal Counsel to represent him at the Tenth Circuit Court of Appeals and in this appeal to the United States Supreme Court. However, an excessive bond of $50,000 was set by the Trial court. It was necessary for the Petitioner to secure this bond with his *only major asset*, his home. The Petitioner was rendered absolutely destitute by the Court and was unable to enter into any financial contract with Legal Counsel to represent him.

After much effort, the Petitioner did secure Legal Counsel. This Legal Counsel failed and refused to present issues to the United States Supreme Court that the Petitioner had requested and felt were necessary for his defense. In two conferences with this Legal Counsel he did not give any indication to the Petitioner that these issues would not be includ-

ed in the "Petition", and the first knowledge the Petitioner had that they were not included was after a typed copy of the "Petition" had been sent to the United States Supreme Court. As a result of this disagreement the Legal Counsel withdrew from the case, without the consent of the Petitioner or the Court, on August 18, 1980. The "Petition for Writ of Certiorari" is required to be filed on August 25, 1980, and the Petitioner is once again being forced to proceed without Legal Counsel.

2. The case before this court lacks the two essential ingredients for a "criminal conviction", that of "Mens Rea and Actus Reas". The Petitioner *did not intend to harm society and in fact did not harm society.* The exercise of a "Constitutional Right" can not be construed as an intent to harm society. The Supreme Court has ruled in *Frothingham v. Mellon, 262 U. S. 447, (1923)* that taxes paid by any one individual is "Infinitesimal" compared to the whole. Therefore, the actions of the Petitioner *did not harm society.* A criminal conviction cannot be sustained in the absence of "Mens Rea and Actus Rea".

3. The charge of "Failure to File" under 26 U.S.C. 7203, was negated by evidence presented when Government admitted receiving forms filed by Defendant, *Appendix A, Exhibit 4 (1), TR of Jury Trial, Page 23.* The Government went on to assert a tax it had been able to compute. *U.S. v. Long*, 618 F2d 74, (9th Cir. No. 78-2844, 5/1/80)

> "....we begin with the premise that Long filed tax forms resembling the facsimiles introduced at the trial. The District Judge found the Government had not met its burden of proving

the contrary; and this finding is not clearly erroneous...The I.R.S. could calculate assessments from Long's string of zeros just as they could if Long had entered other numbers. The resulting assessments might not reflect Long's actual tax liability, but *some computation was possible...*" (emphasis added)

"If the I.R.S. had kept better records, the Government might have proved by its lack of any record of Long's return that he failed to file a return. See *U.S. v. Greenleaf*, 517 F.2d 899, 903 (3rd Cir.) Cert. denied 423 U.S. 985 (1975). If the Service had kept papers such as Long claimed he filed, the government might have sustained some other charge. It did not, nowever, prove the failure to file that was charged in this case."

In the instant case, the I.R.S. was able to compute a tax liability, which was asserted by the government.

4. There was insufficient evidence to sustain a verdict of guilty. No evidence was presented involving Business Income or (loss), Capital Losses, Farm losses and other losses that reduce "Wage and Pension" income under the internal Revenue Code and would render a return by the Petitioner unnecessary.

The Petitioner could not have falsified his W-4 when, in accordance with Section 3402 (n) (2) of the Internal Revenue Code "he anticipated he would incur no liability for income tax imposed under Subtitle A for his current taxable year", and did in fact file forms 1040 for the years in question substantiating that he had incurred no tax liability for the years in question in this instant case.

5. The jury must decide only the facts, not the law as they have done in this instant case. The Court must decide the law. The jury may not have found the Petitioner guilty of "Willful failure to file" and "Falsifing a W-4" if the trial court had not supplied the jury with instructions allegedly based on the Internal Revenue Code without ruling upon the law prior to giving the jury instructions. For example, in a conviction of murder, it is proven to the jury, as fact, that someone died. The jury then decides if the death was from natural or unnatural causes, as a matter of fact not law, and whether the accused caused the death, if by unnatural causes, as a matter of fact not law. (A)However, in this instant case the jury decided whether the Petitioner had committed the crime based on its own interpertation of the Internal Revenue Code, which is a matter of law not fact.

(A) ie.—The Court must first determine and rule that the Petitioner was required to file a return before the jury can decide if Petitioner filed said return, or was required to file said return. No such ruling was made.

6. The trial court Judge acted outside of his authority and jurisdiction by "ordering" a Colorado State official to testify as to State tax matters in a Federal action, without any foundation required as to the statutory authority of the United States Government to so inquire, or the propriety of the state official to so disclose.

The record in this matter will reveal that the state official alluded to "state confidentiality statutes" that prohibited divulgence "unless directed by the Court." Whereupon, without further inquiry:

THE COURT: very well. You are directed to disclose them.

THE WITNESS: Okay.

Nothing more was required as foundation. See Infra, at Appendix A, Exhibit 4 (2).

This error is sufficient to overturn the conviction, it was an abuse of discretion by the Court to admit this evidence and this evidence constituted significant prejudice.

7. The Trial Court Judge Fred M. Winner should have recused himself when he, by his own admissions and demonstration, thru the court records and news media comments, has a definite bias towards alleged protesters. *Appendix A, Exhibit 6.* A sworn affidavit from two witnesses can be supplied the Court that the Judge further has stated, that "one thing I cannot stand is someone drawing funds from the government and not paying taxes on these funds". The Petitioner did draw funds from the government which he believed and still believes are not subject to taxation, constitutionally, under the Internal Revenue Code.

Throughout the trial the Judge continually required the Petitioner to establish grounds for his objections but failed to make the same requirement of the United States Attorney. The Judge denied the Petitioner equal protection of an allegedly neutral court and judge.

In a country where its very system of government is one designed to allow a citizen to make good faith challenges to what he considers an abuse by that

government of his constitutional rights, this court cannot sustain a conviction when a proven biased Judge made the following statements in this instant case:

> "Well, very well, then, this case is one that causes all of us grave concern. We have before us here today a man who was in the parlance of the media at this time a "doubledipper." He is drawing a military pension and he was working for the government, yet he refuses to pay taxes levied by that government. *If everyone took this position*, he would not be receiving his salary, and *indeed we would have anarchy in this country.*
> *Appendix A, Exhibit 1, Page 9 Line 15.*
> (emphasis added)

> "You are working for the United States of America, yet you defy the government of this country."
> *Appendix A, Exhibit 1, Page 11, Line 27.*

> "The sentence I am about to impose is much harsher than the offense requires. I will tell you here and now that if you will come to your senses and disclose to the probation department the information we are properly entitled to receive; I will modify the sentence....."
> *Appendix A, Exhibit 1, Page 12, Line 5.*

> "but as long as you decide to defy the government,...."
> *Appendix A, Exhibit 1, Page 12, Line 29.*

> "In the event that you elect to appeal, the bond on appeal will be $50,000 fully secured unless

you furnish the probation department with the information it is rightly entitled to have.
If, as and when you furnish the probation department with that information, I will modify and substantially modify the appellate bond,...."
Appendix A, Exhibit 1, Page 13, Line 32.

"I recommend to you now that you get a lawyer. Perhaps you realize how much trouble you're in now. Perhaps you realize that you need good, competent legal advice because the sentence I have imposed will mean, if it be affirmed, that you are going to serve a long time in prison, and the government with all of its resources will discover your assets. You're not going to hide them forever, so you might as well face up to the fact that the day of reckoning has arrived."
Appendix A, Exhibit 1, Page 14, Lines 29.

This Court must not sustain a conviction when a biased Judge does not recognize a Constitutional right to redress of grievances, without intimidation by the Court, as guaranteed by *Amendment 1, of the United States Constitiution.*

This Court must not sustain a conviction when a biased Judge continually promised a reduction of sentence and appeal bond, yet to date has failed to reduce the sentence of the Petitioner, after the Petitioner did give the probation department the information it requested. He further failed to reduce the excessive appeal bond and left the Petitioner destitute and unable to secure "adequate Legal Counsel".

This Court must not sustain a conviction when a biased Judge failed to establish the inability of the Petitioner to represent himself, and failed to take any measures to correct the situation.

This Court must not sustain a conviction when a biased Judge does not understand that the primary function of the Judicial Branch of Government is to allow citizens to make good faith challenge and "defy the function of government".

8. This Court cannot sustain a conviction where the Trial Court Judge admitted on record that he is imposing a sentence harsher than is required. There can be no doubt that *Amendment VIII of the Constitution of the United States* has been violated,

> "The sentence I am about to impose is much harsher than the offense requires....."
> *Appendix A, Exhibit 1, Page 12, Line 5.*

Amendment VIII of the Constitution of the United States clearly states:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

9. The instant case before this court was not brought by indictment. This Court must not sustain a conviction that resulted in fine and imprisonment without an indictment, which must be had regardless of the classification fo the crime.

> "Constitutional provision that no person shall, for any indictable offense be proceeded against criminally by information, *was not intended to*

be limited to capital offenses and felonies but applies also to more serious indictable common-law misdemeanors and *statutory misdemeanors* which the Legislature intends should be indictable."
Commonwealth vs. Cano, 133 A.2d 800.
(Emphasis added)

The taxing power of the United States is a provision of the *Constitution Article I, Section 8,* therefore, an offense against the taxing power must be within the meaning of "Infamous Crime" and must be by indictment.

The term "capital or otherwise infamous crime" has been defined by the United States Supreme Court in *Mackin v. United States*, 117 US 384; *Parkinson v. United States*, 121 US 281; *United States v. DeWalt*, 128 US 393; *Medley Petitioner*, 134 US 160, 169 and in *Re Mills*, 135 US 263, 267' as the Court stated in the matter of *Peter J. Classen*, 140 US 200 (1891),

"The purport of the rulings in those cases is, *that a crime which is punishable by imprisonment in the state prison or penitentiary*, as is the crime of which the defendant was *convicted, is an infamous crime*, whether the accused is or is not sentenced or put to hard labor, and that, in determining whether the crime is infamous, the question is, whether it is one for which the *statute authorizes the court to award an infamous punishment*, and not whether the punishment ultimately awarded is an infamous one."

The *Internal Revenue Code sections 7203 and*

7205 do authorize fine and imprisonment and therefore this court must not sustain a conviction where indictment was not had.

10. This Court must not sustain a conviction where the Court assumed jurisdiction over Title 26, of the United States Code, "Civil law" under the Rules of Criminal procedure. Title 26 of the United States Code has not been enacted as "positive law" and therefore cannot be heard under the "Rules of Criminal Procedure". See *Title I, Section 204* of the United States Code.

The Court has the power and the duty to nullify those laws which do not support or which nullify the Constitiution of the United States.

> "...thus the particular phraseology of the Constitution (of the United States) confirms and strengthens the principle supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument..."
> *Marberry v. Madison*, 5 U.S. 137, 2 L.Ed. 60: (1803), at page 180.

> "...where rights secured by the Constitution of the United States are involved there can be no rule making or legislation which would abrogate them..."
> *Miranda v. Arizona*, 380 U.S. 436 (1966).

> "...it is the duty of the courts to be watchful for the constitutional rights of the citizen against stealthy encroachment thereon..."
> *Boyd v. U.S.*, 116 U.S. 616 (1885), at 635.

11. This Court must not sustain a conviction where the Petitioner was not shown to be subject to the Administrative Code of *Title 26, U.S.C.* and such a showing is required before the Petitioner can be penalized for not adhering to its condition. Such subjection to the Code must be shown to be knowing and voluntary by the Petitioner in order for him to be placed under its conditions.

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DECISIONS BELOW

Pertinent decisions below are:

1. Transcript of Sentencing by U.S. District Court, District of Colorado.

2. Decision of U.S. Court of Appeals for the 10th Circuit, affirming the District Court proceedings.

3. Denial of Rehearing

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1651(a).

Petition for Rehearing was denied on June 26, 1980.

The U.S. Court of Appeals for the 10th Circuit issued its original opinion on May 22, 1980.

The Trial Judge, Fred M. Winner, announced his sentence on January 4, 1980.

The Jury submitted its verdict on or about December 5, 1979.

Petition for Enlargment of Time, together with a $200.00 Docket Fee was lodged with this Court, which issued its Order on July 21, 1980, extending the time to August 25, 1980, in which to file Petition for Writ of Certiorari.

STATEMENT OF CASE

Defendant was charged, by Information, with violation of 26 U.S.C. 7203 for the years 1976 and 1977, and 26 U.S.C. 7205 for the years 1976, 1977 and 1978.

After preliminary proceedings, trial was had to Jury with the Defendant appearing Pro Se, aided by John E. Grandbouche, as lay counsel.

The Jury returned its verdict as to all five (5) counts.

Defendant was sentenced to five (5) years, two to run concurrent, in jail plus $20,000.00 fine, and an appeal bond of $50,000.00 was established.

Defendant perfected his appeal to the 10th Circuit Court of Appeals, which in due time affirmed the judgment and sentence of the lower court.

Petition for Rehearing was timely filed and subsequently denied.

Petitioner brings his Petition for Writ of Certiorari.

The Government charged "willful failure to file" income tax returns for the years 1975 and 1976, admitting that Defendant had filed certain returns which the I.R.S. deemed not acceptable in form. The forms filed by the Defendant followed the "Anderson" and "Tim Ogle" returns in form and content. These documents were introduced and admitted into evidence.

The Government also charged "...willfully, knowingly filed false withholding certificates (W4-E) with his employer...".

The Defendant persisted throughout, with his objections as to the jurisdiction of the Court to act, and as to the Consitutionality of the procedures employed and/or permitted.

REASONS FOR GRANTING THE WRIT

I.
CONFLICT OF DECISIONS

The U.S. Court of Appeals, 9th Circuit, issued its decision No. 78-2844, May 1, 1980, entitled *U.S.A. v. Ronald M. Long*, which recognized as a "return", a form filed which contained only zeros as constituting "information relating to the taxpayer's income from which the tax can be computed."

This decision seems to be in conflict with *United States v. Porth*, 426 F2d 519 (10th Cir.), *cert denied*, 400 U.S. 824 (1970), holding:

> "That a tax form that 'does not contain any information relating to the taxpayer's income from which the tax can be computed' is not a valid return under 26 U.S.C. 7203..."

II.
DEPARTURE FROM ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

In this case where the length of sentence (a total of five (5) years, two to run concurrent); the size of the fine ($20,000.00); and the amount of the Appeal Bond ($50,000.00); all seem to be unusually large

and, by the admission of the sentencing judge, are:

> "(T)he Sentence I am about to impose is much harsher than the offense requires..."

It is submitted that this result is of that quality frequently quoted such as to "shock the conscience" of this court.

CONCLUSION

For the reasons set forth herein, the Petitioner respectfully requests that this Honorable Court will grant the Writ to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted this 23rd day of August, 1980, in Denver, Colorado.

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UNITED STATES OF AMERICA,
Plaintiff,

vs.

GILBERT E. CALLOW, JR.
Defendant.

In the United States District Court for the District of Colorado

Criminal Action No. 79-CR-521

Proceedings before the HONORABLE FRED M. WINNER, Chief Judge, United States District Court for the District of Colorado, commencing at or about 9:00 a.m., Friday, January 4, 1980, and continuing thereafter, in Courtroom C502, United States Courthouse, Denver, Colorado.

APPEARANCES

SUSAN ROBERTS, Assistant United States Attorney, appearing on behalf of the plaintiff.

GILBERT E. CALLOW, appearing pro se.

PROCEEDINGS

THE COURT: This morning we have set 79-CR-521, United States of America vs. Gilbert E. Callow, Jr. The defendant has been heretofore tried and convicted by jury verdict of a violation of two counts charging a violation of 26 United States Code, Section 7203, and he has been convicted of three counts

charging a violation of 26 United States Code, Section 7205.

The matter, as I have said, is before the Court for sentencing. The defendant appeared at time of trial pro se with the aid and assistance of two lay advisors that I permitted to sit with him during the trial.

Defendant will please come forward and if either of his advisors wish to come forward, they are welcome to do so.

(Mr. John Grandbouche is present with the defendant.)

THE COURT: now, if you will please stand there. The advisor's name, would you please state your name for the record?

MR. GRANDBOUCHE: John Grandbouche.

THE COURT: And would you like to make any statements either in behalf of your client or in mitigation or would you like to state any reason as to why sentence should not be imposed? I'm asking you, Mr. Grandbouche.

MR. GRANDBOUCHE: Oh, yes.

THE COURT: Would you like to?

MR. GRANDBOUCHE: Yes. I would like to have been able to have defended this man.

THE COURT: Well, of course the law doesn't permit that.

MR. GRANDBOUCHE: I understand.

THE COURT: But I will permit you to make a statement at this time if you care to.

MR. GRANDBOUCHE: Yes, I would like to make a statement.

THE COURT: You go right ahead.

MR. GRANDBOUCHE: During the trial it was brought out we were standing on jurisdiction as being our main premise. He challenged the Court for using civil procedures, and so forth, and we maintained that all the way through.

THE COURT: Of course, you may be able to make them change their minds.

MR. GRANDBOUCHE: That's what we would like to do, sir.

THE COURT: All right, is there anything you'd like to say in mitigation or as to why sentence should not be imposed at this time?

MR. GRANDBOUCHE: I would like to say the sentence should not be imposed due to the fact they didn't use the proper procedure.

THE COURT: That's something the Court of Appeals will have to pass on. Are there any others?

MR. GRANDBOUCHE: No, that's our main premise, that the separation of state powers will be our main argument all the way to the Supreme Court.

THE COURT: Mr. Callow, is there anything you wish to say as to why sentence should not be imposed or anything you wish to say in mitigation or in your own behalf.

THE DEFENDANT: Well, Your Honor, I will appeal the decision.

THE COURT: That's perfectly all right with me.

THE DEFENDANT: And request a stay pending--

THE COURT: Oh, no.

THE DEFENDANT: (continuing) --pending the appeal.

THE COURT: No. Anything else you wish to say?

THE DEFENDANT: Nothing. I believe I'm right in my stand.

THE COURT: Well, very well, then, this case is one that causes all of us grave concern. We have before us here today a man who was in the parlance of the media at this time a "doubledipper." He is drawing a military pension and he is working for the government, yet he refuses to pay taxes levied by that government. If everyone took his position, he would not be receiving his military pension nor would he be receiving his salary, and indeed we would have anarchy in this country.

The defendant has stated to the probation department, and I quote: "I cannot disclose any information regarding my assets due to signing a trust contract and should I so disclose any information I

would be liable."

I rather doubt the legal conclusion that you would be liable to anyone for disclosing your trust contract and your assets in connection with a criminal presentence investigation. I don't know whose advice you are relying on in arriving at that conclusion, but all I can do is presume that since you refused to disclose it, you have unlimited resources, and the fine will be imposed on the basis of that presumption.

You then go ahead in your written statement and say: "I filed two Fifth Amendment returns because of good faith challenge to protect my God given rights and not incriminate myself by giving figures that can easily be altered by anyone. No one has a tax liability at the beginning of a year and labor is not taxable. Therefore, I have filed W-4E's. The income tax is voluntary compliance by the IRS's own books, and a graduated income tax is the second planning of the communist manifesto; therefore, I did not volunteer to have our nation go communist. I did not in any way intend to undermine or overthrow our government. Quite the contrary, most people lie, cheat and steal on their tax returns. I chose to be honest. The only way to save our freedom is to keep bringing these issues of redress before the courts -- or when there is no redress in the court -- when they refuse to decide Constitutional issues in favor of "rubber stamping" the statutes and the IRS statutes, irresponsible people take it to the streets. The courts could stop all of this abuse of government. The Congress has long since ceased to exist. I tried writing letters to my Congressmen. Have you written a letter to your Congressman lately? I went to trial on separation of powers. I challenged the

jurisdiction for criminal prosecution. The only difference between this country and all the rest of the world is -- separation of powers. I stand unreservedly on the *LAW* -- the courts see fit to violate that *LAW* to feed a treacherous bastard of government called the IRS.

"How anyone can live on the $750.00 allowance per person allowed by the government in 1965, which is now ten times higher because of the government's own inflationary policies, is beyond any thinking person's conception.

"When people think they are free and fear their government, they are already in prison. I do not fear a tyrant, I stand unreservedly on God's principle and HIS universal laws -- I can do no other, whatever the consequence.

"And finally, I am not a law breaker -- the government and the court is. And to quote Abraham Lincoln: 'We the people are rightful masters of both Congress and the Courts -- not to overthrow the Constitution, but to overthrow the men who pervert the Constitution.'"

"'To sin by silence when they should protest makes cowards of men.'"

Mr. Callow, you have a long and honorable military service for which your government is rewarding you by a pension. You are working for the United States of America, yet you defy the government of this country. In evaluating the sentence to be given a man, one of the cardinal things to be considered is whether there is any indication of repentance. There is not the slightest indication of repentance on your

part. You have taken the position that you will stand by your defiance and that you will stand by it to the extent that you will not even cooperate with the probation department in disclosing your assets.

You leave me no alternative. The sentence I am about to impose is much harsher than the offense requires. I will tell you here and now that if you will come to your senses and disclose to the probation department the information we are properly entitled to receive, I will modify the sentence, but as long as you elect to stand on advice which is contrary to the decisions of the appellate court in this circuit and every argument advanced by you and by your advisor has been passed on by the appellate courts, every argument has been rejected, you are asking through a non-lawyer advisor for me to say the Court of Appeals doesn't know what it's doing and for me to say that your non-lawyer advisor is right and that the appellate courts are wrong. I'm not going to do that. You are getting bad advice, but you have elected to follow it. You have an easy way to get this sentence modified, and that is to give the probation department the information it is entitled to receive, but unless and until you agree to go along and to do that, reserving to yourself all rights of appeal, I'm not asking that you waive that. I'm simply telling you to give the probation department a copy of that trust and a list of your assets. When you do that, then the sentence will be modified, but as long as you decide to defy the government, it is the judgment and sentence of the Court that on Count I of the indictment you be committed to the custody of the Attorney General of the United States or his duly authorized representative, to be by him imprisoned for a period of one year, and that you be fined $10,000.

On Count II it is the judgment and sentence of the Court that you be committed to the custody of the Attorney General of the United States or his duly authorized representative, to be by him imprisoned for a period of one year, this sentence to be consecutive to the sentence imposed on Count I, and that you be fined $10,000.

On Count III it is the judgment and sentence of the Court that you be committed to the custody of the Attorney General of the United States or his duly authorized representative, to be by him imprisoned for a period of one year. This sentence to be consecutive to the sentence imposed on Count II.

On Count IV it is the judgment and sentence of the Court that you be committed to the custody of the Attorney General of the United States or his duly authorized representative, to be by him imprisoned for a period of one year, this sentence to be concurrent with the sentence imposed on Count III.

And on Count V it is the judgment and sentence of the Court that you be committed to the custody of the Attorney General of the United States or his duly authorized representative, to be by him imprisoned for a period of one year, this sentence to be concurrent with the sentence imposed on Count III.

Now, of course, as we all know and as you have already told me, you have an absolute right to appeal. That is a right that you may exercise, and if you need any help in filing a notice of appeal, the clerk of the court will be happy to assist you in filing the notice of appeal.

In the event that you elect to appeal, the bond on

appeal will be $50,000 fully secured unless you furnish the probation department with the information it is rightly entitled to have.

If, as and when you furnish the probation department with that information, I will modify and substantially modify the appellate bond, but as long as you defy the courts, you're going to have to find out that the courts and the government of the United States will fight back. This government cannot exist if individuals can defy it, and that's what you are trying to do.

There will be a stay of execution granted in this case until nine o'clock, January 7, 1980. If you have not posted — if you have not filed your notice of appeal by nine o'clock Monday morning and have not supported it with the fully secured bond, you will surrender to the United States Marshal's Office here in Denver to commence serving your sentence. If prior to that time you change your mind and decide to supply the probation department with the information it is entitled to receive, you should appear before me at 9:00 a.m., Monday morning for consideration of modification of this sentence and for consideration of modification of the appeal bond.

I have told you before, I tell you again, you have a constitutional right to appear in this case without benefit of counsel. You have elected to exercise that right. I recommended to you before that you get a lawyer. I recommend to you now that you get a lawyer. Perhaps you realize how much trouble you're in now. Perhaps you realize that you need good, competent legal advice because the sentence I have imposed will mean, if it be affirmed, that you are going to serve a long time in prison, and the govern-

ment with all of its resources will discover your assets. You're not going to hide them forever, so you might as well face up to the fact that the day of reckoning has arrived.

Now, do you have any questions?

THE DEFENDANT: None, Your Honor.

THE COURT: Do you understand this?

THE DEFENDANT: I understand.

THE COURT: All right, is there anything further? We will be in recess.

(And these proceedings were concluded.)

REPORTER'S CERTIFICATE

I, ROBBIE GRIGGS, Certified Shorthand Reporter and Official Reporter to this Court, do hereby certify that I was present at and reported in shorthand the proceedings in the foregoing matter; that thereafter my shorthand notes were reduced to typewritten form under by supervision, comprising the foregoing official transcript; further, that the foregoing official transcript is a full and accurate record of the proceedings in this matter on the date set forth.

DATED at Denver, Colorado, this 27th day of February, 1980.

Robbie Griggs
Official Reporter

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	)	
	)	Nos. 79-2197
v.	)	&
	)	80-1068
GILBERT E. CALLOW, JR., *Defendant-Appellant.*	)	

Appeals from the United States District Court
For the District of Colorado
(D.C. No. 79-00521(1))

Submitted on the briefs pursuant to Tenth Circuit Rule 9:

Gilbert E. Callow, pro se.

Joseph F. Dolan, United States Attorney, and Susan R. Roberts, Assistant United States Attorney, Denver, Colorado, for Plaintiff-Appellee.

Before BARRETT, McKAY, and LOGAN, Circuit Judges.

EXHIBIT 2

PER CURIAM

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of these appeals. *See* Fed.R. App.P. 34(a); Tenth Circuit R. 10(e). These causes are therefore ordered submitted without oral argument.

Gilbert E. Callow was convicted by a jury of two counts of willful failure to file a tax return in violation of 26 U.S.C. § 7203, and three counts of fraudulently filing a false withholding exemption certificate in violation of 26 U.S.C. § 7205.[1] Callow thereafter was sentenced to one year of imprisonment and fined $10,000 on Count One; one year of imprisonment and fined $10,000 on Count Two, this sentence to be consecutive to the sentence imposed on Count One; one year of imprisonment on Count Three, this sentence to be consecutive to the sentence on Count Two; one year of imprisonment on Count Four, this sentence to be concurrent with the sentence imposed on Count Three; one year of imprisonment on Count Five, this sentence to be concurrent with the sentence imposed on Count Three. Callow appeals from these convictions. We affirm.

Though often vigorously advised by the trial court to retain counsel, Callow went to trial pro se and has chosen to so proceed on appeal.

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1. § 7203. Willful failure to file return, supply information, or pay tax

> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return...who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

§ 7205. Fraudulent withholding exemption certificate or failure to supply information

> Any individual required to supply information to his employer under section 3402 who willfully supplies false or fraudulent information, or who willfully fails to supply information thereunder which would require an increase in the tax to be withheld under section 3402, shall...upon conviction thereof, be fined not more than $500, or imprisoned not more than 1 year, or both.

Issues raised by Callow on appeal include the following:

1. The district court lacked jurisdiction to try the case;
2. The district court should have recused itself;
3. Callow should have been charged by indictment, rather than by information;
4. The governement failed to show that Callow was required to file a tax return;
5. Evidence was admitted from the state of Colorado's revenue records without a search warrant;

6. The sentence imposed is cruel and unusual punishment;
7. The appeal bond set in the amount of $50,000 (fully secured) is unnecessarily harsh;
8. Callow was forced to reveal a private trust;
9. The government failed to show that Callow had "intended" to harm society; and
10. The jury was allowed to decide "facts of law."

Appellant also raised other procedural and jurisdictional issues in a document entitled "Brief in Support of Petition for Writ of Certiorari."

The relevant facts follow. The record shows that the government presented evidence showing that Callow willfully did not file his tax return for the years in question and that his income was such that he was required to file a return. Evidence was also presented to show that Callow had willfully and knowingly filed a false withholding exemption certificate with his employer. Callow offered no evidence to rebut the government's case against him.

The main thrust of Callow's argument on appeal is that the trial court lacked jurisdiction to try him for the offenses charged. Callow essentially argues that neither Congress nor the Constitution gives the district court jurisdiction over the taxing power of the United States. This argument is frivolous and without merit. *See* United States v. Brown, 600 F.2d 248 (10th Cir.), *cert. denied*, 100 S.Ct. 233 (1979); United States v. Porth, 426 F.2d 519 (10th Cir.), *cert. denied* 400 U.S. 824 (1970).

Callow also asserts that the trial judge is so biased against "tax protesters" that he should have recus-

ed himself. Callow supports this argument by referring to two articles in local newspapers which make no reference to and have no bearing on Callow's case. Beyond these newspaper articles, appellant's displeasure with Judge Winner is that he sustained government objections without requiring detailed explanations.

In the case of United States v. Gigax, 605 F.2d 507 (10th Cir. 1979), we recently considered a tax protester's challenge to Judge Winner's impartiality." *Gigax*, 605 F.2d at 512. We determined that Gigax, as well as a careful review of the record, had failed to point to any circumstances in the trial itself which indicated bias or even the appearance of bias on behalf of the district judge who tried the case. *Id.*

We have thoroughly reviewed the record in this appeal and we can find no circumstance where Judge Winner's impartiality might be reasonably questioned. Furthermore, Callow has failed to point to any part of the record which would indicate any bias on the part of the trial court. Judge Winner did not abuse his judicial discretion in not recusing himself.

Callow next contends that he should have been charged by indictment rather than by information. Callow premises this argument on language in the fifth amendment of the United States Constitution, which provides that: "[N]o person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a grand jury...." Under Rule 7(a) of the Rules of Criminal Procedure "[A]n offense which may be punished by imprisonment for a term exceeding one year ... shall be prosecuted by indictment.... Any other offense may be

prosecuted by indictment or by information."

Even though the *cumulative effect*, of the five counts with which appellant was charged, presented the possibility of imprisonment for more than one year, each of the courts is a separate offense constituting a misdemeanor and punishable by imprisonment of not more than one year. Such offenses may be prosecuted by information. *See* United States v. Johnson, 585 F.2d 374, 377 (8th Cir. 1978), *cert. denied*, 440 U.S. 921 (1979); United States v. Russell, 585 F.2d 368, 370 (8th Cir. 1978); United States v. Kahl, 583 F.2d 1351, 1355 (5th Cir. 1978); United States v. Jordan, 508 F.2d 750, 752-753 (7th Cir.), *cert. denied*, 423 U.S. 842 (1975).

We have considered all other issues raised by appellant and reject them as legally insubstantial. *See* United States v. Brown, 600 F.2d 278 (10th Cir.), *cert. denied*, 100 S.Ct. 233 (1979). *See also*, United States v. Hudler, 605 F.2d 488 (10th Cir. 1979); United States v. Ware, 608 F.2d 400 (10th Cir. 1979); United States v. Porth, 426 F.2d 519, 523 (10th Cir.), *cert. denied*, 400 U.S. 824 (1970).

A review of the record satisfies us that Callow received a fair trial. As we have disposed of this case upon the merits, any outstanding motions filed in either of these consolidated cases, Nos. 79-2197 and 80-1068, are hereby denied as moot. The judgment of the district court is affirmed.

Before Honorable James E. Barrett, Honorable Monroe G. McKay and Honorable James K. Logan, Ciruit Judges, United States Court of Appeals

UNITED STATES OF AMERICA,	)	
Planitiff-Appellee,	)	
vs.	)	Nos. 79-2197
GILBERT E. CALLOW, JR.,	)	and 80-1068
Defendant-Appellant.	)	

This matter comes on for consideration of the appellant's petition for rehearing. After consideration the petition for rehearing is denied.

HOWARD K. PHILLIPS, Clerk

EXHIBIT 3

Q. And what about 118-A through -C?

A. His amended return for 1975.

Q. And 120-A through -X?

A. These are documents for 1976 and 1977.

Q. Well, is 1977 123-A through -0?

A. Yes, it is.

Q. Okay. What do you mean "documents"?

A. There was not enough information for us to process these as an income tax return, so they are just documents.

Q. All right. The entire package that you have mentioned as far as the lettering of 120-A through -X, and 123-A through -0, is the entire package what is contained in the return which is filed?

A. Yes.

Q. Now, you previously testified that the transcript of accounts for years 1976 and 1977 indicated that no return was filed, is that correct?

A. That is correct.

Q. Okay. Now, would you explain for us the status of each of those documents for 1976 and 1977?

A. On the 1976 the taxpayer did not furnish any information to compute a tax liability or any information to process it as a tax return. He objected to everything, and all he did was send us the form 1040 with no information on it other than he was protesting.

obtain them?

A. Okay. I was requested by subpoena to obtain the documents. They are records that are kept in our Department. One thing I should mention is that I am not allowed to divulge the contents of these documents unless directed by the Court because of the state confidentiality statutes.

MISS ROBERTS: All right. Your Honor, I believe the witness is referring to a Colorado Revised Statute under which Court Order is required in order for him to testify about relevant documents, and I would request--

THE COURT: What is the nature of the document?

MISS ROBERTS: State returns and transcript of account.

THE COURT: Very well. You are directed to disclose them.

THE WITNESS: Okay.

Q. (By Miss Roberts) Mr. Muncie, do the records that you have, each one of those exhibits pertain to an account or returns of Gilbert Callow, Jr.?

A. Yes, they do.

Q. And do they indicate an address of 1148 Chester?

A. Yes, all the documents reflect that address.

Q. Now, pertaining to Exhibit series 111-A and -B, is that a document that was prepared in your office?

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA, Plaintiff,	) CRIMINAL CASE) No. 79-CR-521) INFORMATION
v.	) 26 U.S.C. §§ 7203)
GILBERT CALLOW, JR., Defendant.	) and 7205)

COUNT I

The United States Attorney charges that:

During the calendar year 1976, the defendant, GILBERT CALLOW, JR., who was a resident of the State and District of Colorado, had received a gross income of $16,070.64; that by reason of such income he was required by law, following the close of the calendar year 1976 and on or before April 15, 1977, to make an income tax return to the District Director of Internal Revenue for the Internal Revenue District of Colorado at Denver, in the State and District of Colorado, or to the Director, Internal Revenue Service Center, Western Region, Ogden, Utah, stating specifically the items of his gross income and any deductions and credits to which he was entitled; that well knowing all of the foregoing facts, GILBERT CALLOW, JR. did wilfully and knowingly fail to timely make said income tax return to the said District Director of Internal Revenue, to the said Director of the Internal Revenue Service Center, or to any other proper officer of the United States, all in violation of Title 26, United States Code, Section 7203.

EXHIBIT 5

COUNT II

The United States Attorney further charges that:

During the calendar year 1977, the defendant, GILBERT CALLOW, JR., who was a resident of the State and District of Colorado, had received a gross income of $17,619.37; that by reason of such income he was required by law, following the close of the calendar year 1977 and on or before April 15, 1978, to make an income tax return to the District Director of Internal Revenue for the Internal Revenue District of Colorado at Denver, in the State and District of Colorado, or to the Director, Internal Revenue Service Center, Western Region, Ogden, Utah, stating specifically the items of his gross income and any deductions and credits to which he was entitled; that well knowing all of the foregoing facts, GILBERT CALLOW, JR. did wilfully and knowingly fail to timely make said income tax return to the said District Director of Internal Revenue, to the said Director of the Internal Revenue Service Center, or to any other proper officer of the United States, all in violation of Title 26, United States Code, Section 7203.

COUNT III

The United States Attorney further charges that:

On or about October 18, 1976, in the State and District of Colorado, GILBERT CALLOW, JR., a resident of Colorado, who during the calendar year 1976 was receiving retirement income from Retired Pay Operations, Air Force Accounting and Finance Center of Lowry Air Force Base, Colorado, United States Department of the Air Force, wilfully and

knowingly filed a false withholding exemption certificate (W4-E) with his employer, wherein he falsely stated that he incurred no liability for federal income tax for the calendar year 1975, and anticipated no liability for federal income tax for 1976, whereas he then and there well knew that he had incurred an income tax liability for calendar year 1975 and he would incur a liability for federal income tax for 1976, all in violation of Title 26, United States Code, Section 7205.

COUNT IV

The United States Attorney further charges that:

On or about March 29, 1977, in the State and District of Colorado, GILBERT CALLOW, JR., a resident of Colorado, who during the calendar year 1977 was employed at the Commissary at Fitzsimons Army Medical Center, in Colorado, wilfully and knowingly filed a false withholding exemption certificate (W4-E) with his employer, wherein he falsely stated that he incurred no liability for federal income tax for 1976, and anticipated no liability for federal income tax for 1977, whereas he then and there well knew that he had incurred an income tax liability for calendar year 1976 and he would incur a liability for federal income tax for 1977, all in violation of Title 26, United States Code, Section 7205.

COUNT V

The United States Attorney further charges that:

On or about April 24, 1978, in the State and District of Colorado, GILBERT CALLOW, JR., a resident of Colorado, who during the calendar year 1978

was employed at the Commissary at Fitzsimmons Army Medical Center, in Colorado, wilfully and knowingly filed a false withholding exemption certificate (W4-E) with his employer, wherein he falsely stated that he incurred no liability for federal income tax for 1977, and anticipated no liability for federal income tax for 1978, whereas he then and there well knew that he had incurred an income tax liability for calendar year 1977 and he would incur a liability for federal income tax for 1978, all in violation of Title 26, United States Code, Section 7205.

JOSEPH DOLAN
United States Attorney
by: SUSAN R. ROBERTS
Assistant United States Attorney

Tax protest case judge withdraws

Chief U.S. District Judge Fred M. Winner has withdrawn from the case of tax protester Stephen L. Peister, after Peister accused the judge of being biased against tax protesters.

Peister is charged with falsifying tax information. It is alleged that he claimed 99 exemptions on his withholding tax form. Peister is the son of Roy Peister, Tea Party candidate for governor. The case was reassigned Tuesday to U.S. District Judge Richard P. Matsch.

Peister, 28, argued that Winner had proven himself biased and prejudiced against tax protesters by his treatment of tax striker Norman A. Gigax, who was sentenced by Winner to a maximum of one year in prison and $500 fine in February.

Gigax was convicted of falsifying information on his tax-withholding form. Gigax claimed 21 exemptions, the number needed to assure that he wouldn't have to pay any any income tax.

Winner reprimanded Gigax in court at his sentencing and at a hearing regarding whether he would be released on bond pending his appeal. Winner said he was making an example of Gigax to show tax protesters that their contention that no one ever goes to jail for not paying their taxes is wrong.

Winner characterized Gigax's behavior as shocking and outrageous, especially in view of the fact that as an employee of the state Social Services Department, his salary is paid with tax dollars.

In his opinion, Winner also observed that Gigax taught a class in the U.S. Constitution at the Tax Strike Information Center.

In asking that Winner step down from his case, Peister said that he also has taught a class in the Constitution, although not at the Tax Strike Center.

About 15 tax-protester cases are pending in federal court.

EXHIBIT 6

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Judge Withdraws in Tax Case

By HOWARD PANKRATZ
Denver Post Staff Writer

A federal court judge was accused Tuesday of bias against alleged "tax protesters" by the son of a Colorado gubernational candidate.

The judge withdrew from a case after the accusation was made.

The matter surfaced in the case of Stephen L. Peister who the government charges fraudulently filled out a W-4 employee's income-tax withholding form. Peister allegedly claimed 99 exemptions when he wasn't entitled to that many.

Peister, 28, appeared in Denver U.S. District Court Tuesday accompanied by his father, Roy Peister, Tea Party candidate for governor.

The younger Peister demanded that Chief Judge Fred Winner remove himself from his case because of "personal bias and prejudice" against him.

HE ARGUED THAT the "bias and prejudice" was evident in an earlier federal court case during which Winner convicted tax protester, Norman A. Gigax.

Gigax was convicted last month of falsifying his tax forms with the result that he paid no income taxes for 1975. Winner sentenced him to the maximum one year in prison.

Winner lectured Gigax in court, calling his case the "most outrageous" he has seen.

Peister, in asking that Winner step down from his case, noted that Winner, in an order dated March 24, had alleged that Gigax is a "tax protester and had stated that Gigax taught a class in the U.S. Constitution at the Tax Strike Information Center.

"I have also taught a class in the United States Constitution, though not at that location," Peister said. "As the horonable Judge Winner has indicated his disapproval of this activity, defendant has serious doubt that his case can be heard fairly by one who dissapproves of him."

PEISTER ALSO noted that in the order Winner said he had been informed that there are about 15 tax-protester criminal cases in the Denver federal District Court.

"I think that the time has come to serve notice that a correction is going to have to be made in the public announcements that 'no one ever goes to jail' if attention be paid to the tax protesters' erroneous advice," Winner told Gigax.

Winner stepped down from the Peister case Tuesday and assigned the case to U.S. District Judge Richard P. Matsch.

Matsch set a trial date for May 30, and told Peister to inform him by next Tuesday who his attorney will be.

CHAPTER 3—CODE OF LAWS OF UNITED STATES AND SUPPLEMENTS; DISTRICT OF COLUMBIA CODE AND SUPPLEMENTS

§ 204. Codes and Supplements as evidence of the laws of the United States and District of Columbia; citation of Codes and Supplements

United States Code Titles As Positive Law

The following titles of the United States Code have been enacted into positive law by the acts enumerated below:

Title 1, General Provisions—Act July 30, 1947, ch. 388, § 1, 61 Stat. 633.
Title 3, The President—Act June 25, 1948, ch. 644, § 1, 62 Stat. 672.
Title 4, Flag and Seal, Seat of Government, and the States—Act July 30, 1947, ch. 389, § 1, 61 Stat. 641.
Title 5, Government Organization and Employees—Pub.L. 89-554, Sept. 6, 1966, § 1, 80 Stat. 378.
Title 6, Surety Bonds—Act July 30, 1947, ch. 390, § 1, 61 Stat. 646, as amended June 6, 1972, Pub.L. 92-310, Title II, § 203(4), 86 Stat. 202.
Title 9, Arbitration—Act July 30, 1947, ch. 392, § 1, 61 Stat. 669.
Title 10, Armed Forces—Act Aug. 10, 1956, c. 1041, § 1, 70A Stat. 1.
Title 11, Bankruptcy—Pub.L. 95-598, Title I, § 101, Nov. 6, 1978, 92 Stat. 2549.
Title 13, Census—Act Aug. 31, 1954, c. 1158, 68 Stat. 1012.
Title 14, Coast Guard—Act Aug. 4, 1949, ch. 393, § 1, 63 Stat. 495.
Title 17, Copyrights—Act July 30, 1947, ch. 391, § 1, 61 Stat. 652, as amended Oct. 19, 1976, Pub.L. 94-553, Title I, § 101, 90 Stat. 2541.
Title 18, Crimes and Criminal Procedure—Act June 25, 1948, ch. 645, § 1, 62 Stat. 683.
Title 23, Highways—Pub.L. 85-767, § 1, Aug. 27, 1958, 72 Stat. 885.
Title 28, Judiciary and Judicial Procedure—Act June 25, 1948, ch. 646, § 1, 62 Stat. 869.
Title 32, National Guard—Act Aug. 10, 1956, c. 1041, § 2, 70A Stat. 596.
Title 35, Patents—Act July 19, 1952, c. 950, § 1, 66 Stat. 792.
Title 37, Pay and Allowances of the Uniformed Services—Pub.L. 87-649, § 1, Sept. 7, 1962, 76 Stat. 451.
Title 38, Veterans' Benefits—Pub.L. 85-857, § 1, Sept. 2, 1958, 72 Stat. 1105.
Title 39, Postal Service—Pub.L. 91-375, § 1, Sept. 2, 1960, 74 Stat. 578.
Title 41, Public Printing and Documents—Pub.L. 90-620, § 1, Oct. 22, 1968, 82 Stat. 1238.
Title 49, Transportation—Pub.L. 95-473, § 1, Oct. 17, 1978, 92 Stat. 1337.

EXHIBIT 7
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Supreme Court, U. S.
FILED
OCT 31 1980
MICHAEL RODAK, JR., CLERK

No. 80-277

In the Supreme Court of the United States

OCTOBER TERM, 1980

GILBERT E. CALLOW, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-277

GILBERT E. CALLOW, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTIONS PRESENTED

1. Whether petitioner was properly convicted of failure to file income tax returns where the forms that he filed with the Internal Revenue Service contained no information as to income or deductions but only various objections, asterisks, and the word "object."

2. Whether the district judge properly refused to disqualify himself for bias.

3. Whether the district court properly permitted petitioner to represent himself at trial.

4. Whether the evidence was sufficient to support petitioner's convictions for failure to file tax returns and filing false withholding tax forms.

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OPINIONS BELOW

The district court did not issue an opinion. The opinion of the court of appeals (Pet. App. 16-21) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1980. A petition for rehearing was denied on June 26, 1980. The petition for a writ of certiorari was filed on August 25, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Colorado, petitioner was convicted of failing to file income tax returns for 1976 and 1977, in violation of 26 U.S.C. 7203, and of filing false forms W-4 or W-4E in 1976, 1977, and 1978, in violation of 26 U.S.C. 7205. The district court sentenced petitioner to a total of three years' imprisonment and imposed fines totalling $20,000.[1] The court of appeals affirmed per curiam (Pet. App. 16-21).

At the trial, petitioner offered no evidence in his defense. The government's evidence showed that during the years involved, petitioner received a civilian salary and retirement pay from the Air Force, in the amount of $16,070.64 for 1976 and $17,619 for 1977 (Tr. 62, 69). Instead of reporting these amounts on his income tax returns for those years, petitioner submitted Forms 1040 on which he either inserted the word "object" or asterisks

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[1]Petitioner was sentenced to consecutive one-year terms and a $10,000 fine on each count of failing to file returns. Petitioner was sentenced to an additional one-year term on each of three counts of filing false withholding forms. These terms were to be served consecutively to the terms imposed for failure to file, but concurrently with each other.

in the spaces calling for information as to income or deductions. Petitioner also wrote various objections in the margins of the forms (Exhs. 120, 123). For 1977, petitioner's objections included the explanation that the asterisk was used because the "figure is not expressed in U.S. Dollars as I understand that term" (Exh. 123). Despite his receipt of taxable income during the years involved, petitioner filed separate withholding exemption certificates in 1976 and 1978 with Air Force Retired Pay Operations, stating that he had no federal income tax liability for 1975 and 1977. In 1977, petitioner filed a similar form with his current employer, stating that he had no income tax liability for 1976. These withholding forms, like his Forms 1040, were accompanied by petitioner's objections (Exhs. 16, 33, 34).

ARGUMENT

1. The courts below correctly held that the Forms 1040 petitioner filed for 1976 and 1977 were not valid returns within the meaning of Section 7203 of the Internal Revenue Code (26 U.S.C.). It is well established that the act of filing a Form 1040 does not by itself satisfy the requirement of filing a tax return for the purposes of Section 7203. "A taxpayer's return which does not contain any information relating to the taxpayer's income from which the tax can be computed is not a return within the meaning of the Internal Revenue Code." *United States* v. *Porth*, 426 F. 2d 519, 523 (10th Cir.), cert. denied, 400 U.S. 824 (1970). The courts of appeals have relied on *Porth* in numerous instances where the taxpayer, in an act of protest, refused to supply information relating to his income.[2]

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[2]See, *e.g.*, *United States* v. *Edelson*, 604 F. 2d 232, 234 (3d Cir. 1979); *United States* v. *Stout*, 601 F. 2d 325, 328-329 (7th Cir.), cert. denied, 444 U.S. 979 (1979); *United States* v. *Brown*, 600 F. 2d 248, 251 (10th Cir. 1979); *United States* v. *Pryor*, 574 F. 2d 440 (8th Cir.

Plainly, petitioner intended the forms he filed to be a protest against the federal income tax. In no sense did petitioner file forms purporting to disclose his income that was subject to tax. Since petitioner made no real attempt to comply with the requirement of filing a return, the court of appeals properly rejected his claim as "legally insubstantial" (Pet. App. 21) and affirmed his conviction for failure to file.

2. Petitioner argues (Pet. 3) that the decision below conflicts with *United States* v. *Long*, 618 F. 2d 74 (9th Cir. 1980). There, the taxpayer filed Forms 1040 on which he had inserted zeros in the spaces calling for number of exemptions and amounts of income, tax, and tax withheld. He also attached a copy of a tax protest tract to his Form 1040. On these facts, the court of appeals reversed a conviction for failure to file tax returns on the ground that the zeros entered on the forms constituted information from which the tax could be computed. As the court saw the matter, "The I.R.S. could calculate assessments from Long's strings of zeros, just as it could if Long had entered other numbers. The resulting assessments might not reflect Long's actual tax liability, but some computation was possible" (618 F. 2d at 75). On this basis, the court distinguished the case from *Porth* and similar cases in which the defendants failed to complete tax forms or left them blank (618 F. 2d at 75-76).

1978); *United States* v. *Dillon*, 566 F. 2d 702 (10th Cir. 1977); *United States* v. *Irwin*, 561 F. 2d 198 (10th Cir. 1977), cert. denied, 434 U.S. 1012 (1978); *United States* v. *Hoopes*, 545 F. 2d 721 (10th Cir. 1976), cert. denied, 431 U.S. 954 (1977); *United States* v. *Silkman*, 543 F. 2d 1218, 1219 (8th Cir. 1976), cert. denied, 431 U.S. 919 (1977); *United States* v. *Jordan*, 508 F. 2d 750, 752 (7th Cir.), cert. denied, 423 U.S. 842 (1975); *United States* v. *Klee*, 494 F. 2d 394, 397 (9th Cir.), cert. denied, 419 U.S. 835 (1974); *United States* v. *Radue*, 486 F. 2d 220 (5th Cir. 1973), cert. denied, 416 U.S. 908 (1974); *United States* v. *Daly*, 481 F. 2d 28 (8th Cir.), cert. denied, 414 U.S. 1064 (1973).

Although the court in *Long* held that the government did not prove the defendant guilty of failure to file, it observed that the government might have sustained some other charge (presumably a charge of filing a false return) (*id.* at 76).

We question the soundness of the ruling in *Long* that the Internal Revenue Service could calculate tax liability from the zero entries so that the defendant's form in that case met the return filing requirements. But contrary to petitioner's contention, the facts of this case are not sufficiently comparable to *Long* to establish a conflict in the circuits. While the defendant in *Long* simply entered zeros on his Form 1040, here petitioner entered no numbers on his forms from which his tax arguably could be computed. To the contrary, he simply entered various objections, asterisks, or the word "object". There was no way the Internal Revenue Service could have computed his tax liability. Indeed, this case is comparable to one in which this Court recently declined review. See *United States* v. *Smith*, 618 F. 2d 280 (5th Cir.), cert. denied, No. 79-6894 (Oct. 6, 1980). There, the defendant reported on his form that he had "Less than $750.00 constitutional dollars as defined by the U.S. Constitution" and that "$ is used to indicate constitutional dollars (gold or silver coin)" (79-6894 Pet. 4). Similarly, petitioner here reported that he received no "constitutional" dollars—not that he had no "income" as that term is used in connection with federal income tax returns. See *United States* v. *Edelson*, 604 F. 2d 232 (3d Cir. 1979); *United States* v. *Brown*, 600 F. 2d 248, 251 (10th Cir. 1979). As in *Smith*, the court below therefore correctly affirmed petitioner's conviction for failure to file a return from which his tax could be computed.

3. Petitioner also argues (Pet. v-viii) that the district judge was biased and contends (Pet. viii, 3-4) that the penalties imposed violate due process and constitute cruel and unusual punishment. For the most part, petitioner's complaints relate to the sentencing proceedings.[3] The record shows, however, that the district judge at all times treated the petitioner fairly. Any remarks made at sentencing that may indicate the judge's disapproval of petitioner's activities (Pet. v-viii) were clearly based upon information acquired during trial and indicate no unfair bias. *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583 (1966); *United States* v. *Bobo*, 586 F. 2d 355 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979); *United States* v. *Bernstein*, 533 F. 2d 775 (2d Cir. 1976).[4]

Finally, although the district judge stated to petitioner that "[t]he sentence I am about to impose is much harsher than the offense requires" (Pet. vi, viii, 4, Pet. App. 12), the sentence imposed was well within the statutory limits

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[3]Petitioner also complains (Pet. vi-vii) that the district court refused to reduce the $50,000 appeal bond, but he fails to show the full cooperation with probation authorities that the court required before reducing the $50,000 bond. Moreover, petitioner has not shown that he sought reduction of this bond in the court of appeals, as is required by Fed. R. App. P. 9(b), nor has he shown any other reason to disregard the "great deference" that is ordinarily given to the district judge's determination of the amount of a bond. *Mecom* v. *United States*, 434 U.S. 1340, 1341 (1977) (Powell, Circuit Justice).

[4]Petitioner's citation of newspaper articles (Pet. v; Pet. App. 30-31) that indicate that the district judge withdrew from another tax protestor case fails to demonstrate the personal bias against petitioner required by 28 U.S.C. 455 to require recusal. See *United States* v. *Gigax*, 605 F. 2d 507 (10th Cir. 1979), where the court rejected similar charges made against the same judge in another tax protestor case. Cf. *Lawton* v. *Tarr*, 327 F. Supp. 670 (E.D. N.C. 1971).

and thus is not subject to attack upon review. *Dorszynski* v. *United States*, 418 U.S. 424, 431, 440-441 & n.14, 443 (1974); *Townsend* v. *Burke*, 334 U.S. 736, 741 (1948); *United States* v. *Lamont*, 565 F. 2d 212, 220 (2d Cir. 1977), cert. denied, 435 U.S. 914 (1978).[5]

4. Petitioner further contends (Pet. i-ii) that the district court erred in failing to explore the extent of his education or his ability to conduct his own defense before allowing petitioner to represent himself at trial. The district court, however, was only required to ascertain that petitioner manifested a "knowing exercise" of his right to represent himself. *Faretta* v. *California*, 422 U.S. 806, 836 (1975). Here, the record demonstrates that petitioner resisted the repeated warnings of the magistrate and two district judges to engage a lawyer[6] and instead chose to conduct his own defense, assisted by a lay advisor who, with the district court's permission, sat with petitioner. In choosing to proceed *pro se*, petitioner made an informed choice and knew the consequences of his

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[5]At sentencing, the district judge advised petitioner that he would modify the sentence if petitioner later cooperated with probation authorities (Pet. App. 12). Subsequently, when petitioner finally appeared with counsel at a hearing on the setting of an appellate bond, the district judge pointedly told petitioner's counsel that a Rule 35 motion should be filed, and that the court would act upon such a motion after the appellate process (Transcript of Hearing on Appeal Bond 124).

[6]See, *e.g.*, Transcript of Pre-trial Proceedings on November 2, 1979, at 4-6; Pet. App. 14; Transcript of Hearing on Appeal Bond 5-6, 56-57.

actions. *United States* v. *Brown*, 591 F. 2d 307, 310 (5th Cir. 1979); *United States* v. *Richardson*, 588 F. 2d 1235, 1241 (9th Cir. 1978), cert. denied, 440 U.S. 947 (1979).[7]

Petitioner's assertion (Pet. iii) that the evidence was insufficient is effectively refuted by the government's prima facie case. In order to convict for violations of Section 7203 and 7205, the government was only required to show that petitioner voluntarily and intentionally violated a known legal duty to file proper tax returns and to provide correct withholding information. *United States* v. *Pomponio*, 429 U.S. 10 (1976). To prove its case, the government produced the testimony of payroll officials who showed that petitioner had received sufficient gross income during the years in question to require him to file tax returns and that petitioner had filed withholding forms which falsely stated that he had incurred no tax

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[7]Petitioner did not raise the denial of counsel issue in the district court or in the court of appeals. It is therefore not properly before this Court. *California* v. *Taylor*, 353 U.S. 553, 557 n.2 (1957); see also *United States* v. *Ortiz*, 422 U.S. 891, 898 (1975). Moreover, although petitioner urges (Pet. i) that he could not afford counsel on appeal because his house was encumbered as security for his bond, he does not explain why he could not have paid an attorney from his current income. See Transcript of Hearing on Appeal Bond 55-56.

Finally, petitioner complains (Pet. i-ii) that he had no counsel in preparing this petition. But petitioner acknowledges (*ibid.*) that he did have legal counsel but that he was dissatisfied with the petition that his counsel prepared. There is nothing to indicate why petitioner could not have obtained other counsel to prepare a satisfactory petition. At all events, there is no constitutional right to appointed counsel in seeking review by this Court of a criminal conviction. See, generally, *Ross* v. *Moffitt*, 417 U.S. 600, 616-618 (1974). While the courts of appeals as a matter of practice may appoint counsel to represent indigents on criminal appeals, including the filing of a petition for certiorari in this Court, petitioner made no showing of indigency as required by 18 U.S.C. 3006A, and did not apply for such appointed counsel.

liability in the years immediately prior to the years in which the forms were filed (Tr. 18-22, 23-30, 34-39). The government also produced an Internal Revenue Service employee who, relying upon evidence before the jury as to petitioner's income and deductions in 1975, 1976 and 1977, reconstructed his taxable income and showed that petitioner was required to file a return for the years in question (Tr. 59-70). The government also introduced petitioner's earlier proper returns, showing that he knew of his obligations to file and to produce correct withholding information (Exhs. 115, 116, 117), and it introduced the false withholding exemption forms and the improperly filed Forms 1040 for the years in question (Exhs. 16, 33, 34, 120, 123). This evidence was more than sufficient to convict petitioner of failure to file and filing false withholding forms. See *Glasser* v. *United States*, 315 U.S. 60, 80 (1942).

Contrary to petitioner's further contention (Pet. ii), the government was not required to show that he posed any substantial degree of harm to society, nor was it required to overcome any evidence which petitioner might have produced in his defense but did not (see Pet. iii). Here, petitioner did not contest the government's evidence; in failing to do so, he assumed the risk that the jury would find against him. *Holland* v. *United States*, 348 U.S. 121, 138-139 (1954).[8]

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[8]Petitioner attacks (Pet. iv-v) the introduction of evidence as to his state tax returns. But the court's order authorizing disclosure of such material was not improper, especially where the relevant statute permits disclosure "in accordance with judicial order." Colo. Rev. Stat. § 39-21-113(4)(a) (1973).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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